Supreme Court, U.S.
FILED
JAN 6 1983
ALEXANDER L. STEVAS
CLERK

No. 82-844

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

**UNITED STATES ex rel. BENEDETTO J. MASSARELLA,**
*Petitioner,*

v.

**RICHARD J. ELROD, Sheriff of Cook County, et al.,**
*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

TYRONE C. FAHNER
Attorney General, State of Illinois

MICHAEL B. WEINSTEIN*
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

*Counsel for Respondents*

E. JAMES GILDEA
Special Assistant Attorney General
401 North Michigan Avenue, Suite 3400
Chicago, Illinois 60611
(312) 222-0800

*Of Counsel*

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 31431—55—1-3-83)

## QUESTION PRESENTED FOR REVIEW

Whether an extension of a criminal statutory limitations period from 18 months to 36 months, which took effect before the shorter term had expired, is violative of the *ex post facto* clause.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTION PRESENTED FOR REVIEW | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 7 |
| REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI: | |
| THE EXTENSION OF A CRIMINAL LIMITATIONS PERIOD BEFORE IT HAS EXPIRED DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE | 11 |
| CONCLUSION | 17 |

## TABLE OF AUTHORITIES


| CASES: | PAGE(S) |
|---|---|
| *Beazell v. Ohio*, 269 U.S. 167 (1925) | 16 |
| *Bridges v. United States*, 346 U.S. 209 (1953) | 13 |
| *Buckley v. Valeo*, 424 U.S. 1 (1976) | 14 |
| *Clements v. United States*, 266 F.2d 397 (9th Cir. 1959), *cert. denied*, 359 U.S. 985 (1959) | 13 |
| *Dobbert v. Florida*, 432 U.S. 282 (1977) | 12, 16 |
| *Falter v. United States*, 23 F.2d 420 (2d Cir. 1928) | 13 |
| *In Re Medley*, 134 U.S. 160 (1890) | 15 |
| *James v. Twomey*, 466 F.2d 718 (7th Cir. 1972) | 13 |
| *Lindsey v. Washington*, 301 U.S. 397 (1937) | 15 |
| *Massarella v. Illinois*, 449 U.S. 1077 (1981) | 2, 16 |
| *People v. Anderson*, 53 Ill. 2d 437, 292 N.E.2d 364 (1973) | 13 |
| *People v. Liebling*, 36 Ill. App. 3d 1073, 344 N.E.2d 520 (1st Dist. 1976) | 13 |
| *People v. Massarella*, 53 Ill. App. 3d 774, 368 N.E. 2d 507 (1st Dist. 1977), *rev'd*, 72 Ill. 2d 531, 382 N.E.2d 262 (1978) | 9 |
| *People v. Massarella*, 80 Ill. App. 3d 552, 400 N.E. 2d 436 (1st Dist. 1979), *leave to appeal denied*, 81 Ill. 2d 586 (1980) | 2, 15 |
| *People v. Novotny*, 41 Ill. 2d 401, 244 N.E.2d 182 (1968) | 7, 11 |
| *United States v. Obermeier*, 186 F.2d 243 (2d Cir. 1950) | 13 |
| *United States v. Richardson*, 512 F.2d 105 (3d Cir. 1975) | 13 |
| *United States ex rel. Massarella v. Elrod, et al.*, 510 F. Supp. 1082 (N.D. Ill. 1981), *rev'd and remanded*, 682 F.2d 688 (7th Cir. 1982) | 1, 9, 10 |
| *Weaver v. Graham*, 450 U.S. 24 (1981) | 12, 14, 15 |

STATUTES: PAGE(S)

*Ill. Rev. Stat.*, 1971, ch. 38, sec. 2-7 ..... 3
*Ill. Rev. Stat.*, 1971, ch. 38, sec. 2-11 ..... 3
*Ill. Rev. Stat.*, 1971, ch. 38, sec. 3-5 ..... 3, 7
*Ill. Rev. Stat.*, 1971, ch. 38, sec. 32-2 ..... 4, 7
*Ill. Rev. Stat.*, 1973, ch. 38, sec. 3-5 ..... 7
*Ill. Rev. Stat.*, 1973, ch. 38, sec. 32-2 ..... 4, 7
*Ill. Rev. Stat.*, 1973, ch. 38, sec. 1005-1-4 ..... 4
*Ill. Rev. Stat.*, 1973, ch. 38, sec. 1005-5-3 ..... 4
*Ill. Rev. Stat.*, 1973, ch. 38, sec. 1005-7-1 ..... 5
*Ill. Rev. Stat.*, 1973, ch. 38, sec. 1005-8-1 ..... 5
*Ill. Rev. Stat.*, 1973, ch. 38, sec. 1008-2-4 ..... 6, 15
*Ill. Rev. Stat.*, 1973, ch. 131, sec. 4 ..... 6, 15

CONSTITUTIONAL PROVISIONS:

United States Constitution, Art. I, Sec. 9, cl. 3 ..... 3
United States Constitution, Art. I, Sec. 10, cl. 1 .... 3
United States Constitution, XIV Amendment ..... 3

In The

# Supreme Court of the United States

October Term, 1982

---

**UNITED STATES ex rel. BENEDETTO J. MASSARELLA,**

*Petitioner,*

v.

**RICHARD J. ELROD, Sheriff of Cook County, et al.,**

*Respondents.*

---

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is appended to the Petition for Writ of Certiorari as Appendix A (*United States ex rel. Massarella v. Elrod, et al.*, 682 F.2d 688 (7th Cir. 1982), and the underlying order of the United States District Court for the Northern District of Illinois is appended thereto as Appendix C (*United States ex rel. Massarella v. Elrod, et al.*, 510 F. Supp. 1082 (N.D. Ill. 1981). In addition, the decision of the Illinois Appellate Court affirming petitioner's convic-

tions for theft and perjury is reported as *People v. Massarella*, 80 Ill. App. 3d 552, 400 N.E.2d 436 (1st Dist. 1979). The Illinois Supreme Court's denial of a Petition for Leave to Appeal is reported at 81 Ill. 2d 586 (1980).

Previously, this Court denied a Petition for Writ of Certiorari to the Illinois Appellate Court filed by this petitioner. *Massarella v. Illinois*, 449 U.S. 1077 (1981).

The petitioner also instituted certain post-conviction collateral proceedings in the Illinois state courts (which he refers to in his Petition at page 4, note 2 and page 16, note 19). Those proceedings terminated with the trial court denying relief and the Illinois Appellate Court dismissing an appeal therefrom in an unreported order.

## JURISDICTION

The jurisdictional requisites are adequately stated in the Petition for Writ of Certiorari at 2. However, as set forth in the argument portion of this Brief in Opposition, respondents do not believe that petitioner has shown any compelling reason for this Court to grant the requested Writ.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Constitutional Provisions:**

Article I, Sec. 9, cl. 3, United States Constitution, provides that:

> No ex post facto Law shall be passed.

Article I, Sec. 10, cl. 1, of the United States Constitution provides that:

> No State shall . . . pass any . . . ex post facto Law, . . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> Section 1. . . . No State shall . . . deprive any person of life, liberty or property, without due process of law. . . .

**Statutes:**

**Illinois Revised Statutes, 1971**

Chapter 38, Section 2-7:

> "Felony" means an offense punishable with death or by imprisonment in the penitentiary.

Chapter 38, Section 2-11:

> "Misdemeanor" means any offense other than a felony and includes conduct prohibited by a statute which provides no penalty for its violation.

Chapter 38, Section 3-5:

> (a) A prosecution for murder, manslaughter, treason, arson, or forgery may be commenced at any time.
>
> (b) Unless the statute describing the offense provides otherwise, or the period of limitation is extended by Section 3-6, a prosecution for any offense not designated in Subsection (a) must be commenced within 3 years after the commission of the offense if it is a felony, or

within one year and 6 months after its commission if it is a misdemeanor.

Chapter 38, Section 32-2:

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

Penalty.

A person convicted of perjury shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 14 years, or both fined and imprisoned.

**Illinois Revised Statutes, 1973**

Chapter 38, Section 32-2:

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

* * *

(d) Sentence.

Perjury is a Class 3 felony.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

Chapter 38, Section 1005-1-4:

"Conditional Discharge" means a sentence or disposition of conditional and revocable release without probationary supervision but under such conditions as may be imposed by the court.

Chapter 38, Section 1005-5-3:

(a) Every person convicted of an offense shall be sentenced as provided in this Section, except in cases of murder to which Section 5-8-1A of this Code is applicable.

* * *

(d) When a defendant is convicted of a felony or misdemeanor, the court may sentence such defendant to:

(1) a period of probation or conditional discharge except in cases of murder, rape, armed robbery, violation of Sections 401(a), 402(a), 405(a) or 407 of the Illinois Controlled Substances Act or violation of Section 9 of the Cannabis Control Act;

(2) a term of periodic imprisonment;

(3) a term of imprisonment;

(4) a fine. However, a fine shall not be the sole disposition in felony cases but may be imposed in such cases only in addition to another disposition under paragraph (d) of this Section.

Chapter 38, Section 1005-7-1:

(a) A sentence of periodic imprisonment is a sentence of imprisonment during which the committed person may be released for periods of time during the day or night or for periods of days, or both. Unless the court orders otherwise, the particular times of release shall be determined by the Department of Corrections, the sheriff, or the Superintendent of the house of corrections, who is administering the program.

* * *

(c) The court may impose a sentence of periodic imprisonment for a felony or misdemeanor on a person who is 17 years of age or older. The court shall not impose a sentence of periodic imprisonment if it imposes a sentence of imprisonment upon the defendant.

(d) A sentence of periodic imprisonment may be for a term up to 2 years, or the longest sentence of imprisonment that could be imposed for the offense, whichever is less. The term of the sentence shall be calculated upon the basis of the duration of its term rather than upon the basis of the actual days spent in confinement.

Chapter 38, Section 1005-8-1:

(a) A sentence of imprisonment for a felony shall be an indeterminate sentence set by the court under this Section.

(b) The maximum term shall be set according to the following limitations:

* * *

(4) for a Class 3 felony, the maximum term shall be any term in excess of one year not exceeding 10 years.

Chapter 38, Section 1008-2-4:

Prosecution for any violation of law occurring prior to the effective date of this Act is not affected or abated by this Act. If the offense being prosecuted has not reached the sentencing stage or a final adjudication, then for purposes of sentencing the sentences under this Act apply if they are less than under the prior law upon which the prosecution was commenced.

Chapter 131, Section 4:

(This statute is presently located in Chapter 1, § 1103 of the 1981 Illinois Revised Statutes, without change.)

No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act.

## STATEMENT OF THE CASE

On August 26, 27 and 30, 1971, Benedetto J. Massarella gave false testimony under oath in judicial proceedings which he himself commenced against the Illinois Department of Revenue and some of its employees in the Circuit Court of Cook County, Illinois, for the purpose of enjoining the defendants from continuing a criminal tax investigation of Massarella and his solely owned corporation, Bee Jay's Truck Stop, Inc.

On the dates when he gave false testimony, perjury under Illinois law was an offense that could be punished by a fine and/or a penitentiary term of from one to 14 years, or by incarceration in a penal institution other than a penitentiary for up to one year.[1] The alternative feature of punishment other than incarceration in a penitentiary resulted in the offense being classified a misdemeanor under Illinois law.[2]

In January, 1973, Illinois adopted a Unified Code of Corrections (the "Code") in which perjury was classified a felony.[3] This occurred 16 months after Massarella gave the false testimony. The statute of limitations, both before and after enactment of the Code, was 18 months for misdemeanors and 36 months for felonies.[4]

Massarella was indicted along with several others for conspiracy, perjury, and theft of $425,407 of state motor

---

[1] *Ill. Rev. Stat.*, 1971, ch. 38, sec. 32-2.

[2] *People v. Novotny*, 41 Ill. 2d 401, 244 N.E.2d 182 (1968).

[3] *Ill. Rev. Stat.*, 1973, ch. 38, sec. 32-2.

[4] *Ill. Rev. Stat.*, 1971, ch. 38, sec. 3-5; *Ill. Rev. Stat.*, 1973, ch. 38, sec. 3-5.

fuel taxes on June 8, 1973, 22 months after his commission of perjury. He moved to dismiss the perjury charges, alleging that the indictment was returned beyond the 18-month statute of limitations. The trial judge held that the statute had been extended to 36 months before it had run as to Massarella's criminal acts.

Massarella was tried by a jury in 1974, and verdicts of guilty were returned against him for conspiracy, perjury and theft of $425,407 in state motor fuel tax funds. Illinois law requires the merger of substantive and inchoate offenses at sentencing, and, therefore, the conspiracy conviction was vacated.

When Massarella appeared for sentencing on January 8, 1975, the trial judge, in accordance with the provisions of the Code with respect to superseding mitigating penalties, offered him the option of being sentenced under the statutes in effect at the time his criminal acts were committed or under the Code.[5] The Code attempted to unify and organize various statutes relating to crimes and punishments. It provided for certain lesser alternative forms of punishments such as "conditional discharge"[6] and "periodic imprisonment"[7] not found in the prior statutes. It reduced the maximum penitentiary term for the offense of perjury from 14 years to 10 years but increased the possible fine from $1,000 to $10,000.[8] After conferring with his attorney, Massarella elected to be sentenced under the provisions of the Code.

---

[5] *Ill. Rev. Stat.*, 1973, ch. 38, sec. 1008-2-4; *See also Ill. Rev. Stat.*, 1973, ch. 131, sec. 4

[6] *Ill. Rev. Stat.*, 1973, ch. 38, sec. 1005-1-4.

[7] *Ill. Rev. Stat.*, 1973, ch. 38, sec. 1005-7-1.

[8] *Ill. Rev. Stat.*, 1973, ch. 38, secs. 32-2, 1005-8-1.

The trial judge sentenced Massarella on the theft charge to five years' probation conditioned on his serving two of those years in periodic imprisonment; imposed a $10,000 fine; and ordered him to pay restitution to the state in the amount of $425,407. As to the perjury conviction, the judge sentenced Massarella to a penitentiary term of from one to three years and imposed a fine of $10,000. The judge also ordered that the term of periodic imprisonment for theft run concurrently with the penitentiary sentence for perjury and that any time served under periodic imprisonment be credited against the penitentiary term.

Massarella appealed the convictions and sentences to the Illinois Appellate Court, First Judicial District. That court first reversed, holding that the Illinois Attorney General, who had prosecuted the case, did not have statutory power to prosecute such offenses under Illinois law. *People v. Massarella*, 53 Ill. App. 3d 774, 368 N.E.2d 507 (1st Dist. 1977). The Illinois Supreme Court subsequently reversed and remanded for consideration of other issues which had not been decided by the appellate court. *People v. Massarella*, 72 Ill. 2d 531, 382 N.E.2d 262 (1978). On remand, the appellate court affirmed all convictions in a 26 page opinion. *People v. Massarella*, 80 Ill. App. 3d 552, 400 N.E.2d 436 (1st Dist. 1979). The Illinois Supreme Court denied Massarella's petition for leave to appeal. 81 Ill. 2d 586 (1980). This Court denied a Petition for Writ of Certiorari. 449 U.S. 1077 (1981).

Massarella then filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois. The district court judge denied the petition. *United States ex rel. Massarella v. Elrod, et al.*, 510 F. Supp. 1082 (N.D. Ill. 1981). The United States Court of Appeals for the Seventh Circuit,

on July 14, 1982, reversed and remanded, holding that although there was no *ex post facto* violation resulting from the extension of the statute of limitations, the reclassification of perjury under the Code meant that Massarella stood convicted of a felony for which he was subject to adverse collateral consequences. The court of appeals ordered the district court to issue the writ and to order the state to resentence Massarella under "the law in place when [the] crime occurred." *United States ex rel. Massarella v. Elrod, et al.*, 682 F.2d 688, 690 (7th Cir. 1982). Illinois law still gives Massarella the option to elect under which statute he wishes to be sentenced.

Both the petitioner and respondent filed Petitions for Rehearing *In Banc*, which were denied on September 23, 1982.

## REASON FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

### THE EXTENSION OF A CRIMINAL LIMITATIONS PERIOD BEFORE IT HAS EXPIRED DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE.

Petitioner's argument amounts to this:

1. The Illinois Unified Code of Corrections, enacted after he had committed perjury, reclassified his crime from a misdemeanor to a felony.[9]
2. Because certain collateral adverse consequences attach to felony convictions which do not attach to misdemeanor convictions, the reclassification, for all purposes, violates the *ex post facto* clause (even though petitioner's sentence was well within the range of punishments under the prior misdemeanor classification).
3. The extension of the limitations period before it would have expired under the former statute was itself a result of the change in classification.
4. Therefore, the extension of the limitations period was violative of the *ex post facto* clause.

---

[9] The former statute, because it allowed for alternative forms of punishment of imprisonment in a penitentiary for up to fourteen years or in some other place of confinement for up to a year, meant that perjury was classified as a misdemeanor under the Illinois Supreme Court's holdings. (*See People v. Novotny*, 41 Ill. 2d 401, 244 N.E.2d 182, 183-84 (1968). The classification was somewhat misleading because whereas misdemeanors could be prosecuted upon complaint only, if the state intended to seek a penitentiary term for perjury, it had to prosecute the defendant upon a grand jury indictment, as it did in this case. Thus, this class of penal statutes came to be called "indictable misdemeanors."

Petitioner's logic fails under this Court's holding in *Weaver v. Graham*, 450 U.S. 24, 36, n.22 (1981). There, this Court held that only the *ex post facto* portion of a new law is void. It also held that any other provisions of a statute which are not themselves *ex post facto* may remain effective.

Petitioner, by arguing that anything arising from the reclassification is an *ex post facto* violation, ignores the difference between the substantive and procedural aspects of the newer statute. The court of appeals, following the prescription of this Court in *Weaver v. Graham*, distinguished between those two aspects and held that only the substantive portion of petitioner's conviction was violative of the *ex post facto* clause.

Although respondents do not agree with the court of appeals' opinion insofar as it holds that petitioner stood convicted of a felony merely by electing after trial to be sentenced under the Illinois Unified Code of Corrections,[10] the court was nevertheless correct in making a distinction between the procedural and substantive aspects of the newer statute in determining whether both were subject to the *ex post facto* clause.

Petitioner argues that "[A]ny post-conduct change in the law which is any more burdensome to a defendant or which operates to his disadvantage—over and above sentencing considerations—is an *ex post facto* law barred by the Constitution." (Pet. at 13). This Court has already rejected that argument. In *Dobbert v. Florida*, 432 U.S. 282, 293 (1977), this Court stated, "Even though

---

[10] Respondents have themselves filed a Petition for Writ of Certiorari (No. 82-811) wherein they set forth their reasons for disagreement with this portion of the court of appeals' opinion.

it may work to the disadvantage of a defendant, a procedural change is not *ex post facto.*"

Under federal law, it has commonly been accepted that limitations statutes are procedural, not substantive. *Bridges v. United States*, 346 U.S. 209, 226-27 (1953); *United States v. Obermeier*, 186 F.2d 243, 254-55 (2d Cir. 1950). It has also been held under federal law that an extension of a limitations period after commission of an offense but before expiration of the prior period is not an *ex post facto* violation. *Falter v. United States*, 23 F.2d 420, 425-26 (2d Cir. 1928); *Clements v. United States*, 266 F.2d 397, 399 (9th Cir. 1959), *cert. denied*, 359 U.S. 985 (1959); *United States v. Richardson*, 512 F.2d 105, 106 (3d Cir. 1975) (dictum).

Under Illinois law, statutes of limitations have also been held to be procedural. *People v. Anderson*, 53 Ill. 2d 437, 440, 292 N.E.2d 364 (1973); *People v. Liebling*, 36 Ill. App. 3d 1073, 344 N.E.2d 520, 523 (1st Dist. 1976). The court in *Liebling* also pointed out that under Illinois law although a reclassification after commission of an offense is permissible for procedural purposes, it is not permissible for substantive purposes. 344 N.E.2d at 523. That statutory construction was disregarded by the Seventh Circuit in this case, although in an earlier case the Court had held that the Illinois statutory scheme, by its very terms, precludes constitutionally proscribed *ex post facto* laws. *James v. Twomey*, 466 F.2d 718, 721 (7th Cir. 1972). (See Respondents' Petition for Writ of Certiorari (No. 82-811) at 11-13).

Petitioner's arguments do not demonstrate how the extension of the statute of limitations by virtue of reclassification, when limited to that procedural purpose only, makes this case any different from *Falter v. United States* or *Clements v. United States*. A statutory provi-

sion may serve more than one function, as does the Illinois classification scheme that distinguishes between misdemeanors and felonies. The fact that the classification portion of the Unified Code of Corrections could not be applied substantively did not nullify it for all other purposes. *Cf. Buckley v. Valeo*, 424 U.S. 1, 75-82 (1976).

Petitioner's argument, at page 13 of his Petition, that the reclassification of the offense directly subjected him to a harsher penalty, is a separate question which does not deal with the issue now before this Court: the court below sided with petitioner in holding that he was subjected to enhanced punishment as a result of the reclassification, and it held that he should now be sentenced under the former statute. In addition, respondents do not agree with petitioner's statement that the prescribed punishment was actually enhanced under the newer statute. Petitioner himself chose to be sentenced under the newer statute and still claims that prerogative, for reasons which he must believe are to his advantage. (See Pet. at 16-17).[11] It is inconsistent and illogical for him to argue that the newer statute was harsher while maintaining that it is the one he preferred to be sentenced under when required to make a choice between the two.

Petitioner's arguments at pages 14 through 18 of his Petition are fallacious. After arguing the applicability of this Court's holding in *Weaver v. Graham* in the court below, he now says that that case is distinguishable from this one. (Pet. at 15). While respondents agree that *Weaver v. Graham* is not in point with the *ex post facto*

[11] The court of appeals below (682 F.2d 688, 690), as well as the district court (510 F. Supp. 1082, 1084), perceived the rationale for Massarella's electing to be sentenced under the newer statute.

issue involved in this case, they believe the court below was correct in following this Court's resentencing remedy fashioned in *Weaver*. *Cf. Lindsey v. Washington*, 301 U.S. 397 (1937); *In Re Medley*, 134 U.S. 160 (1890).[12]

Petitioner's argument that it is not now possible to sentence him under the old law is not a question that this Court should decide. *In Re Medley*, 134 U.S. at 174. But aside from that, the former statute is not repealed insofar as petitioner's right to be sentenced under it is concerned. Under *Ill. Rev. Stat.*, 1973, ch. 38, sec. 1008-2-4 and *Ill. Rev. Stat.*, 1973, ch. 131, sec. 4, the prior law remains in effect for all prosecutions which have not reached a final adjudication. This case falls in that category even if the court of appeals' decision is not disturbed.

Petitioner asks this Court to erase his conviction for perjury simply because the newer statute permitted the State of Illinois to extend the period within which it might prosecute him from 18 months to 36 months. The fact that the statute was extended prior to its expiration as to petitioner's crime is, as far as he is concerned, beside the point. What is not evident from petitioner's present Petition is that a concomitant result of the grant-

[12] Petitioner also refers to what he says are pending state post-conviction proceedings. (Pet. at 4, n.2, and 16, n.19). His post-conviction petition was denied by the trial court, and the appellate court has dismissed his appeal. Petitioner tried to argue in those proceedings that *Weaver v. Graham* altered the law on *ex post facto* violations thereby nullifying the Illinois Appellate Court's decision in his case, *People v. Massarella*, 80 Ill. App. 3d 552, 400 N.E.2d 436 (1st Dist. 1979)—an obvious fallacy. He also argued that his election to be sentenced under the newer statute was not knowingly and intelligently made. The trial court rejected the latter argument after Massarella's counsel told the judge that his client was not willing to be resentenced under the former statute. Thus, there is no failure-to-exhaust issue in this case.

ing of his request would be that he could then challenge his theft conviction as well. Along with his perjury indictment, petitioner was jointly tried and convicted for theft of Illinois State motor fuel taxes in the amount of $425,407. Although that conviction has been upheld in these habeas corpus proceedings, it remains the subject of a subsequent challenge by petitioner if he were able to argue hereafter that the jury heard evidence of his acts of perjury which it would not have heard had the trial court dismissed the perjury charge.[13] That is why petitioner finds the remedy fashioned by the court of appeals allowing the state to resentence him under the former perjury statute unpalatable.

With these considerations in mind, respondents point out that petitioner has not articulated one cogent reason why he should not be sentenced under either of the two statutes in question. His arguments simply do not demonstrate that he was the victim of "arbitrary and oppressive legislation." *Beazell v. Ohio*, 269 U.S. 167, 171 (1925). The *ex post facto* clause was not intended to limit the legislative control of remedies and modes of procedure which do not affect matters of substance. *Beazell*, 269 U.S. at 171; *Dobbert v. Florida*, 432 U.S. at 293.

---

[13] This is precisely what petitioner argued in his first Petition for Writ of Certiorari to this Court. (Case No. 80-304; *cert denied, Massarella v. Illinois*, 449 U.S. 1077 (1981)).

## CONCLUSION

For the foregoing reasons, respondents pray that the instant Petition for Writ of Certiorari be denied.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General, State of Illinois

MICHAEL B. WEINSTEIN*
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

*Counsel for Respondents*

E. JAMES GILDEA
Special Assistant Attorney General
401 North Michigan Avenue, Suite 3400
Chicago, Illinois 60611
(312) 222-0800

*Of Counsel*

January 3, 1983

* Counsel of Record